19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1057

FREDERICK C. MERGNER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JOHN H. BURNETT,
JOHN J. SIRICA,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Frederick C. Mergner, petitioner hereinafter called the defendant, prays that a writ of certiorari be issued to review the judgment entered February 19, 1945, in the United States Court of Appeals for the District of Columbia (R. 85).

Judgment Below

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Jurisdiction

The jurisdiction of the court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. Sec. 347), and under Rule 38 of the Revised Rules of the Supreme Court of the United States. The opinion of the United States Court of Appeals for the District of Columbia was filed February 19, 1945, and this petition was filed March 19, 1945. The opinion of the United States Court of Appeals for the District of Columbia is included in the record certified to this Court (R. 81).

Statement of Case

The Government's Evidence

The petitioner, hereinafter called the defendant, was indicted for murder in the first degree (R. 4-5). He was convicted of murder in the first degree and sentenced to be electrocuted (R. 6-9). The United States Court of Appeals for the District of Columbia affirmed the conviction (R. 85).

On October 25, 1943 about 8 p. m. three or four shots were heard in the vicinity of Fifth and A Streets, Northeast, in this District (R. 15). Shortly thereafter a man was seen on Seventh Street, Northeast. He and a woman were at the door of a parked automobile (conceded to be the defendant's). The door was open and the man was removing the woman from the car. He had her in his arms and placed her on the ground (R. 12). The woman was mumbling incoherently. The woman's head was bending back, her face was bleeding and appeared to be bruised. The man asked one Grace M. Lucas what she was looking at and drove away. The woman was on the sidewalk, lying partially in a tree box. A manhole cover was partially off of the manhole in the street (R. 13).

The body was that of Charlotte Robinson, the deceased named in the indictment (R. 11-12). After the man was seen to drive away, it was found that Mrs. Robinson was still alive and had on only one shoe. The other shoe could not be found at the scene (R. 13-14). It was then ascertained that the manhole cover was about half or two-thirds off and slid back on the street and that the body of Mrs. Robinson was fifteen to eighteen feet from the manhole (R. 14).

Mrs. Robinson was removed to Casualty Hospital. She was suffering from three bullet wounds on the left cheek, one on the left temple, and a fracture of the third finger of the left hand. All of these places had powder burns on them. Mrs. Robinson died at 9 p. m., October 25, 1943, as a result of the wounds in her head (R. 14-15).

Two bullets taken from the head of Mrs. Robinson were thought to have been fired through defendant's gun, as well as the bullet found in the defendant's automobile by Sergeant Crooke (R. 31).

Detective Sergeants Crooke and Perry went to the defendant's home, 3328 University Place, near American University, the following day, October 26, 1943, about 2 p. m. Opposite the residence was defendant's automobile. There was a bullet hole in the right ventilator window and a ladies' coat on the front seat of the car. The front seat had a flowered covering with blood stains on it. Sergeant Perry went to the house, met the defendant's father and was invited in. Upon entering, the defendant inquired if that were the police and the father answered "Yes." The defendant inquired of the two Sergeants if either of them were Inspector Barrett. They said "No" (R. 15).

After inquiry by Sergeant Perry defendant said that Charlotte Robinson had worked at that house, that he was in love with her, but that he never wanted to see her again, that she was a rat (R. 15).

When the police officers entered the above premises there was a wine bottle out of which defendant's father gave him a small drink. The defendant then got the bottle, but his father took it away from him (R. 16).

While Sergeant Crooke was talking to the defendant at the University Place address, defendant was noticeably under the influence of alcohol. The Sergeant could understand the defendant very plainly. There was no thickness of the defendant's tongue. Defendant was very nervous; on one or two occasions he cried and gritted his teeth. Defendant did not make any particular remarks when crying; he would make a face or grimace (R. 17).

Sergeant Perry testified that defendant, at the time of his arrest, got abusive, loud and boisterous; he would curse and swear, tell the Sergeant that defendant could whip him, that defendant had never been whipped in his life and if the Sergeant did not think that the defendant could whip him, the Sergeant could feel defendant's arm and see how hard it was. Defendant volunteered these remarks (R. 19). Sergeant Perry further stated that defendant would start cursing off and on, "would have spells of cursing and then would talk naturally, fairly normal." Perry could not say what brought on the cursing spells, but it seemed that most of the cursing occurred when the deceased's name was mentioned. The defendant seemed hostile to the deceased and cursed both of the police Sergeants (R. 20).

The defendant was placed under arrest and asked where the gun was. Defendant said that it was in the car. Sergeant Perry stepped out of the room and Sergeant Crooke was asked to sit down. As the latter sat down, the defendant got up from his chair and pulled a gun from his hip pocket. The Sergeant jumped on defendant's back, the rug slipped and defendant went down on his face. The defendant stated that he was going to kill one of the police officers and the gun was then taken from him (R. 16).

Sergeant Crooke did not pay a lot of attention to the threat of defendant because he "thought defendant was talking" (R. 17).

After the gun was taken from the defendant, the Detective Sergeants raised the defendant and sat him in a chair. It was not known whether the defendant could have gotten up by himself (R. 17). After the defendant was seated in the chair he was "staring off in a staring manner" (R. 18).

While in the University Place house when defendant was standing still he "had a little weave" from liquor (R. 18).

The defendant was taken in the police car which started for No. 8 Police Precinct. En route a radio call ordered the defendant taken to No. 10 (R. 16).

On the way to No. 10 Precinct, Sergeant Perry talked to the defendant and "apparently, defendant understood." At that time defendant insisted that Perry get him some whiskey, but the latter "stalled defendant off," told him he could not guarantee that he could and did not know whether they would pass any liquor stores. The defendant stated that he would tell "all about it" if Perry would get him some liquor (R. 19).

It was noticed that defendant staggered real bad climbing the steps at No. 10 Precinct. When the defendant talked to Sergeant Crooke, the latter understood defendant very well and defendant seemed to understand what was said to him (R. 16).

Upon arrival at No. 10, defendant was turned over to Inspector Barrett and Lt. Flaherty of the Police Department (R. 16).

The police sergeants returned to the University Place address and found in the automobile a ladies' coat, a ladies' slipper, an umbrella and a ladies' pocketbook. A bullet was

taken from the top of the car. A man's pair of shoes and a man's coat were taken from the house (R. 17).

Some of the articles taken from the automobile had the same type of blood on them as that of the deceased. The blue shoe found in the automobile was the mate of the one deceased wore the night of the shooting (R. 32).

Miss Verna Harrison, a friend of the deceased, testified as to the conduct of defendant and deceased prior to the shooting and stated that she saw the defendant on Sunday, the day before the shooting (R. 33). At that time the defendant came to the room where that witness and deceased had been living and left a $100.00 bond which deceased had purchased from one of the defendant's daughters and a check for $20.00 for salary due the deceased from the defendant (R. 34).

Testimony Out of Presence of the Jury

Robert J. Barrett, Inspector of Police, talked to the defendant on October 26, 1943, about 3 p. m. at No. 10 Precinct. Before that conversation was adduced, the jury was excluded and the testimony of the Inspector was taken out of their presence. The Inspector stated that the defendant was not taken before the United States Commissioner until 4:15 p. m. (R. 20), and that defendant's condition was the same then as it was at No. 10 (R. 22).

Defendant had known Inspector Barrett for a long time. Their children were friends and played together (R. 21, 25).

Barrett testified that the defendant was being taken to No. 8 Precinct but that witness ordered the defendant to No. 10 "for the purpose of witness seeing defendant and talking to him" (R. 20). At No. 10, defendant was under the influence of intoxicants. Defendant cried and "had to hold" Barrett's coat and hand. Defendant cried while he was talking; he was not hysterical, but defendant had Bar-

rett's arm, pulled his coat and squeezed his hand. The defendant talked very plain at times and at other times a little different. Defendant would start to tell Barrett about what he had done, then he would break off, start talking about the children and start crying. The defendant, at that time, stated that he had been drinking since Friday. (The conversation occurred on Tuesday.) Defendant "looked the part, he looked like a man that had been on a drinking spree for a few days"; his eyes were bloodshot, his face was red; the odor of alcohol was on his breath and "he gave every indication of a man who had been drinking a couple of days" (R. 21).

"The reason witness (Barrett) sent defendant to No. 10 was because witness could talk to him there" (R. 21).

It was conceded that Inspector Barrett offered no inducement to the defendant to make a statement at No. 10 Precinct. At that time, however, the defendant had no attorney (R. 22).

Lt. Flaherty of the Police Force stated that the defendant was not drunk at No. 10 Precinct when he and Inspector Barrett talked to the defendant but that you could tell he had been drinking from his appearance and "his conversation." On that occasion defendant would cry at times, "and that other times he would grab witness and show how strong he was." Defendant "would jump from one object to another" (R. 22).

The inconsistency of the testimony of the police officers respecting the drunkenness of the defendant is best demonstrated by Lieutenant Flaherty, who had the temerity to testify that he "would not say defendant was drunk" yet in the next breath he said: "In fact, if defendant was walking down the street *and witness did not come in contact with him,* witness would not arrest him" (R. 22).

The only conclusion that can be drawn from that last statement of Flaherty is, that if Flaherty *had come in con-*

tact with the defendant on the street, Flaherty would have arrested him for being drunk.

Needham C. Turnage, called by the defendant, stated that he was United States Commissioner for the District Court of the District of Columbia. Between 4 and 5 p. m. on October 26, 1943, a complaint was issued against the defendant and a plea of not guilty was entered by Mr. Turnage because

> the defendant was so emotionally disturbed that he ought not to have been arraigned. Defendant was apparently in a condition where he had very little understanding of the gravity of the charge which had been placed against him. Defendant was not in any position to be arraigned at that time. Defendant seemed to have no understanding whatever of the predicament he was in. Defendant answered to his name, he made something of a scene, which I would call a scene, not too terrible of a scene, and acted certainly abnormally, to say the least. Defendant was talking, his conversation was absolutely unintelligible (R. 23).

The defendant "was never arraigned" (R. 24).

Objection to Confessions

After the testimony of the police officers Barrett and Flaherty and that of Commissioner Turnage was heard as above, the defendant objected to the admission of the statements made to Inspector Barrett and Lt. Flaherty on the ground that defendant was taken to No. 10 Precinct for the purpose of having the police talk to him when he should have been arraigned, the defendant was intoxicated or under the influence of liquor and had no attorney. That objection was overruled and exception noted. The jury was recalled and the testimony resumed (R. 24).

Substance of the Confessions

The statements which the defendant made to the police and which were admitted in evidence are found in the

testimony of Inspector Barrett and Lt. Flaherty (R. 24-31). The testimony of the officers respecting the physical and mental condition of the defendant is substantially the same as that given out of the presence of the jury.

At No. 10 Precinct the defendant stated that he had given himself up, but Inspector Barrett explained to the defendant that he had not given himself up and that Officers Perry and Crooke had arrested him (R. 24).

The defendant stated that he had known Mrs. Robinson since April 5, 1942; that she was sick and he had taken care of her; that around Christmas time a friend of the deceased had visited her and defendant thereafter noticed a change in Mrs. Robinson; that Mrs. Robinson was not a citizen of the United States when she came to work for the defendant, but she later endeavored to become naturalized. From the correspondence of the deceased, the defendant learned that she had a criminal background and that her husband was in trouble (R. 24).

The defendant also stated that Mrs. Robinson was after him for money and that on the night of the killing defendant's daughter had called the deceased and talked to her. The defendant then talked to deceased over the phone and the latter wanted $4,000.00 and asked that some of her clothes be brought to her. The defendant met Mrs. Robinson at Fourth and East Capitol Streets. They drove to Fourth and A Streets and en route the deceased kept asking where the money was. The defendant told her it was in a bag in the back seat and she looked there and in the glove compartment of the car and did not see it. There was "quite some argument" and at Fourth and A Streets the defendant shot Mrs. Robinson several times. The defendant then stated that he drove to Seventh and A Street where he was going to put Mrs. Robinson down the sewer but a lady came along and he left Mrs. Robinson there. The

defendant stated that Mrs. Robinson was a rat and that he wanted to put her down there with the rats (R. 25).

The defendant never explained what the argument was between himself and Mrs. Robinson that resulted in the shooting; the defendant did not know how many shots he fired (R. 28-29).

The defendant was in love with the deceased, thought she was in love with him and they talked of marriage. Shortly after getting her citizenship papers, Mrs. Robinson got a job. The defendant stated that he tried to get her to come back; that he called her several times but could not get her on the phone (R. 28).

The defendant stated that he saw his car in front of his house which had a bullet hole in it, blood on it and that he saw a slipper therein; that Mrs. Robinson's pocketbook was on the front seat of the car and he took it and put it in a bureau drawer in his bedroom (R. 26).

The defendant was booked at headquarters at 4:15 p. m. following the statement and immediately taken to the United States Commissioner (R. 26).

The officers talked to the defendant on October 28 at the District Jail. The defendant at that time was told that there were a few things the officers wanted to straighten out. The defendant said he wanted to correct his statement about the shooting at Fourth and A, that it happened on Fifth between A and East Capitol. Defendant said that he was not in the habit of carrying a gun, that he kept the gun in his dresser drawer at home and had it in his pocket that night. When told by the officers that his statement about putting the deceased in the sewer for the rats was more or less vicious, the defendant said "she is a rat, she is rotten, she is rotten inside" (R. 25). The defendant stated that he would rather not answer other questions until he talked to his attorney. The defendant's condition at the Jail was

noticeable, there was a big difference from his condition at the precinct. At the Jail the defendant was not under intoxicants and looked like a perfectly sober man (R. 27).

The Defense Evidence

Evidence was produced by the defendant showing that the defendant was intoxicated as early as October 21, preceding the shooting on October 25, 1943 (R. 35). On Friday, the 22nd, the defendant "was stinking drunk" (R. 55). "He was very drunk Saturday night and Sunday" (R. 38). On the Sunday preceding the shooting the "defendant was quite intoxicated about five p. m." He talked at random, rather foolishly, and was unsteady on his feet (R. 35-36). The defendant was sent home from work on Sunday and ordered not to come back to work until his condition was better (R. 41, 40). On Monday morning the defendant was drunk, "he could not speak straight, he mumbled, and the smell of liquor was enough to knock you down" (R. 55). The defendant called his employer Monday and the former said at that time, that he was in no shape to return to work (R. 41).

The defendant was drunk Monday night (R. 38-36-35), both before and after the shooting (R. 38). On Monday night after the shooting the defendant could not talk right and a person "could not get any sense out of defendant" (R. 36). On Tuesday about one p. m. the defendant was "very much under the influence of liquor" (R. 36).

When taken before the United States Commissioner about 4:15 p. m. on Tuesday, October 26 (R. 26), the defendant's talk was intelligible at times and unintelligible at others, he was "sort of mumbling." The "defendant's condition was such that witness (United States Commissioner Turn-Turnage) ought not to have permitted defendant to enter a plea in any type of case." Defendant did not plead guilty

or not guilty before the Commissioner, but the Commissioner entered a plea for the defendant (R. 39).

After appearing before the United States Commissioner, the defendant was placed in custody of Mr. Kearney, Chief Deputy, United States Marshal. This was about 5:30 p. m. on Tuesday. Mr. Kearney testified that the defendant was drunk. The defendant said that he had drunk at least a gallon of both wine and whiskey. The defendant was fingerprinted but his signature could not be obtained because the defendant could not write (R. 37). The defendant thought that he had his Packard car with him and told Mr. Kearney to take it and get some whiskey.

Dr. Murphy, a Deputy Coroner for this District, testified that he saw the defendant between 5:20 and 5:30 p. m. on Tuesday, October 26, in a cell at the Court House in the presence of Drs. McDonald and Rosenberg (Coroner and Deputy Coroner, respectively). The purpose of Dr. Murphy's visit was to make tests to determine whether the defendant had any blood on him. Defendant's speech was coherent at times and incoherent at other times and more or less rambling in character. Dr. Murphy knew that the defendant had been indulging in alcoholic beverages (R. 39), but not to the extent of complete intoxication. No test was made then because the doctor "did not think defendant qualified to give permission for said test." The defendant attempted to write his name but the signature was very rambling. It could be read, but it was the type of a nervous individual, it was all run together and the letters were very irregular (R. 40).

Mr. Sard testified that he was Chief Clerk of the D. C. Jail and he saw the defendant on Tuesday, October 26, 1943, about 6 p.m. The defendant appeared to be in somewhat of a haze, he was orderly and quiet and was placed

in the "control cell, a cell used for the control of inmates." (R. 41).

Defendant's Testimony

The defendant told of meeting the deceased and of his actions and drinking preceding the time he met Mrs. Robinson on the night of the killing (R. 41-47). He testified that he met Mrs. Robinson at Fifth and A Streets, S.E., and started drinking; that he and Mrs. Robinson were drinking and that "it was a blackout." He didn't remember a thing. "He did not remember going home or anything." (R. 47). The defendant then narrated the details of what occurred the morning after the shooting. (R. 48-49).

The defendant stated that he did not know whether or not he killed Mrs. Robinson; that he did not know whether he had the revolver when he went to meet the deceased and that he did not see it at that time (R. 49). The defendant testified at length on cross-examination (R. 49-54) but he did not say anything respecting the actual shooting other than state the fact that he did not remember what occurred. The defendant did say that the story that he had told at No. 10 precinct was what he read in the newspapers; that his car had blood in it and everything was disarranged. The defendant remembered going over to have a date with Mrs. Robinson that night and all those facts caused him to call Inspector Barrett.(R. 52).

Expert Testimony

Dr. Antoine Schneider, in answer to a hypothetical question based on the facts theretofore proved by the prosecution and defense, stated that in his opinion the defendant was of unsound mind on the evening of the shooting (R. 56-57). Dr. Edgar D. Griffin, for the Government, disputed such testimony (R. 58-64).

Motions of Defendant

After the foregoing testimony was introduced the defendant moved the Court to strike the statement of the defendant to Inspector Barrett and Lt. Flaherty at No. 10 Precinct on the ground that the statement was involuntary and that the defendant had no counsel, that he was under the influence of liquor, was taken to No. 10 Precinct for the purpose of getting a statement from him before he was arraigned and that no attempt to arraign the defendant was made until some hour and fifteen minutes after the statement was made (R. 54-65).

The defendant also moved the Court to direct the jury that they could not convict the defendant of murder in the first degree, on the ground of insufficiency of evidence, relative to intent, premeditation and deliberation (R. 65).

The Court overruled these motions, the case was argued and the Court instructed the jury (R. 65-78), leaving the question of degree of murder (R. 67-71) (R. 73-74) and the admissibility of defendant's confessions (R. 75) to the jury to determine as matters of fact.

Question Presented

In a homicide case, where it appears that the defendant was illegally detained, that he was intoxicated to the point of stupefaction and that he was unable to consult counsel,—is a confession obtained under such combination of factors admissible in evidence against the defendant?

Reasons for Granting the Petition

The petitioner, in the trial court and in the appellate court relied upon a *combination* of proved circumstances which made his confession inadmissible.

First, the evidence disclosed that the petitioner had no counsel at the time of his arrest and at the time of his con-

fession. He relied upon *Powell* v. *Alabama*, 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55, *Johnson* v. *Zerbst*, 304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019 and *Walker* v. *Johnston*, 312 U. S. 275, 85 L. ed. 830, 61 S. Ct. 574.

Secondly, the evidence disclosed that at the time the confession was obtained from petitioner, he was hopelessly intoxicated, to the point of stupefaction.

Third, the petitioner was, for a short time, illegally detained by the arresting officers but for the *express purpose* of obtaining a confession. Petitioner relied on *McNabb* v. *United States*, 318 U. S. 332, 87 L. ed. 819, 63 S. Ct. 608, and *United States* v. *Mitchell*, 322 U. S. 65, 88 L. ed. 812, 64 S. Ct. 896.

The appellate court held the *McNabb* Case, Supra, to be inapplicable and pitched its decision *solely* on the ground that intoxication of a defendant, was insufficient to exclude a confession.

The law as announced by this Court in the *McNabb* and *Mitchell* Cases, Supra, was not followed.

That this case is of importance is demonstrated by the fact that, in and by the judgment complained of and to be brought under review, human life has been declared as forfeit. That its correct decision is of great and wide-spread public interest and essential to the certain and general administration of justice in the courts of the United States is sufficiently and plainly apparent from the statement made and the failure on the part of the final appellate tribunal, sitting in the District of Columbia, to accept as binding authority the opposite pronouncement of this the tribunal of final appeal in matters of Federal cognizance, sitting in all these United States.

Again, in the interest of uniformity and clarity of decision in matters of such prime importance as the admission of evidence tending to conviction in capital cases in courts

of the United States, it is respectfully submitted that this petition for certiorari should be granted.

Conclusion

WHEREFORE, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to The United States Court of Appeals for the District of Columbia, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings in case numbered 8806 on its docket "*Frederick C. Mergner* v. *United States*," and that the said judgment of the Court of Appeals, for the District of Columbia, may be reversed and for such other and further relief as to the court may seem meet and proper.

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